Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
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REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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SUMMARY

What's really at stake in the Commission's issuance of regulations implementing the local competition provisions of the 1996 Act? The Commission's Chief Economist recently observed that in the creation of local competition "gains in efficiency equal to several percent of gross revenues would be fairly modest by the standards of what firms can achieve when challenged by competition."[1] In 1994, total local and access telecommunications revenues were approximately $100 billion annually.[2] If "several percentage points" is only five percent, the capitalized value of successfully implementing local competition would exceed $50 billion in efficiency gains for America, an amount which dwarfs even the $20 billion raised to date through the Commission's spectrum auctions. Little wonder the Commission feels the need to create a "national framework" within which to speed Congress' mandate. As the Department of Justice explains in urging clear, national rules: "The Act reflects basic economic theory, long experience and common sense in recognizing that without such parameters, incumbent monopolists would only grudgingly negotiate arrangements to facilitate competitive entry;" (DOJ Comments at p. 6).

Monopoly interests have little to offer in response to this "common sense." Pacific pleas that: "We are not opposed to a

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[1] Speech by Joseph Farrell delivered May 15, 1996.

[2] Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, May 1996, Table 31.

'national' approach per se -- only to a mandatory approach, built around 'minimum requirements,' that substitutes the judgment of national regulators for the judgments of diversely situated, well-informed private parties and States." Pacific fails to explain, however, why diversely-situated private parties enjoy some special insight into the proper "minimum requirements" for local competition.[3] The disingenuous protests of the ILECs that they will do the right thing if they are just left alone defies their obvious self-interest.[4]

Concerning the concrete procedural and substantive rules that need to be adopted in this proceeding, the Commission must recognize that its present task is far removed from the more traditional role of regulator as arbitrator. This is not a situation in which the baby can be safely split down the middle in the assurance that the issue can be revisited should the outcome turn out to be less than desirable. Ubiquitous facilities-based local competition will not emerge unless the Commission issues rules that replicate the competitive model as

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[3] Pacific certainly seems to have differences with at least one state regulator, since it differs strongly with the California PUC on such important issues as switch unbundling. Compare Pacific Comments at 43 with California PUC Comments at 26.

[4] Pacific is well-informed that it will not need interLATA permission in order to implement much of the international traffic strategy of its prospective owner, SWB, which has significant interests in the Mexican telephone industry. Even more remarkable is BellSouth's request for "aspirational objectives" rather than mandatory standards, which RBOCs would be encouraged to meet through "streamlined" review of Section 271 petitions (BellSouth Comments at 14). In short, BellSouth wants to be rewarded for complying with Section 251 by having the requirements of Section 271 effectively waived.

faithfully as possible.

Most facilities-based competitors are starting with almost no market recognition, and confront entrenched monopolists with considerably greater financial and technical resources. Despite the ILEC claims to the contrary, new entrants to the local exchange markets do not have bargaining power equal to that of the LECs from whom they must obtain interconnection agreements. There is no room for cautious compromise in Commission's determination of Section 251 rules. Instead, the Commission should issue final rules, based on sound economic principles, that create a meaningful environment for facilities-based local competition.

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The Association for Local Telecommunications Services ("ALTS") hereby submits these reply comments in response to the Commission's Notice of Proposed Rulemaking ("Interconnection NPRM") released April 19, 1996, in the above proceeding.[1]

I. THE PROPOSED REGULATIONS ARE CLEARLY WITHIN THE COMMISSION'S AUTHORITY UNDER THE 1996 ACT.

The incumbent local exchange carriers ("ILECs") have launched a wide array of attacks on the Commission's ability to adopt the rules under consideration in the Interconnection NPRM, all sharing the common premise that it is simply "business as usual" at the Commission. The truth is, as the Department of Justice aptly notes: "The Telecommunications Act of 1996 reflects a fundamental change from the premises which have guided telecommunications regulation for most of this century;" (DOJ Comments at i)(emphasis supplied). The best way for the

[1] ALTS is the national trade association of over thirty facilities-based competitive providers of access and local exchange services.

Commission to inaugurate a new era of ubiquitous telecommunications competition is to reject the ILECs' last-gasp challenges to its clear authority under the 1996 Act to adopt the rules under consideration in the Interconnection NPRM.

A. Challenges to the Interconnection NPRM Based on the Proposed Respective Roles for the States and the Commission Are Unfounded.

1. State Authority Over Local Rates Is Not Imperiled by the Interconnection NPRM.

Many parties contend that Section 2(b) of the 1934 Act precludes the Commission from adopting rules creating a strong national framework for local competition. See Bell Atlantic's Comments at 3; "Prescribing national rules that preempt state authority over the fundamentally intrastate matters covered by section 251 would substantially overstep the bounds of the Commission's statutory authority," (discussing at length Section 2(b), Louisiana Public Service v. FCC, 476 U.S. 355 (1986), and maxims of construction concerning "preemption" of state power). See also NARUC Comments at 9-10.

a. Section 2(b) Does Not Give the States Authority Over the Relationship Between Incumbent Providers and New Entrants.

These arguments ignore a simple but critical fact. In Section 2(b,) Congress gave the states power the power to regulate the intrastate rates and services of monopoly telephone providers. Section 2(b) does not -- and could not -- give the states any power to regulate the relationship between competitive providers and incumbent providers because no such

industry arrangement existed in 1934.[2] Congress first spoke to the relationship between incumbents and competitive local entrants in 1996, and it dealt with that issue without ever having delegated it to the states. Consequently, Congress was perfectly free to direct the Commission to issue implementing regulations concerning that relationship without needing to withdraw any portion of the authority delegated to the states under Section 2(b).[3] Given that statutes must be construed so as to avoid conflicts, Bell Atlantic and USTA's effort to create a conflict in order to defeat the Interconnection NPRM is

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[2] Section 2(b) was adopted to address the Shreveport Rate Cases, 234 U.S. 342 (1914), which had determined that the Interstate Commerce Commission's authority extended to both interstate and intrastate railroad transportation. NARUC appeared before Congress in connection with the proposed Federal telecommunications legislation in 1934, and testified as to the largely local nature of telecommunications as it existed at that time, and the importance of insuring that the new federal act did not disrupt the ability of local agencies to protect end users from monopoly providers. Regulation of Interstate and Foreign Communications by Wire or Radio, and for Other Purposes, Hearings on S. 2910 Before the Committee on Interstate Commerce, 73rd Cong. 2d Sess., 156 (1934)(Statement of Andrew R. McDonald, First Vice President of the Executive Committee of the National Association of Railroad and Utility Commissioners).

[3] The absence of any delegation of authority to the states over the matters covered by Section 251 in Section 2(b) is entirely unaffected by the fact some states were regulating the ILEC-to-CLEC relationship prior to the 1996 Act. It is well understood that states may regulate matters that lie within the ultimate reach of Congress' constitutional authority until such time as Congress or its delegated agency exercises that authority. Indeed, as NARUC itself points out, the "states have regulated all aspects of local telephone service since 1910;" NARUC Comments at 12, even though the Interstate Commerce Commission (which then had jurisdiction over telecommunications) at that time had "the same power [after passage of the Mann-Elkins Act] to override State regulation in the telephone field as it has in the railroad field ...;"(House Hearings on the 1934 Act at 135-136).

entirely unpersuasive.

b. The Interconnection NPRM's Proposed Issuance of Guidelines Would Not Create a Conflict Even if Section 2(b) Did Confer ILEC-CLEC Ratemaking Power on the States.

It is also clear the Interconnection NPRM's proposed national guidelines would not invade state jurisdiction even if Section 2(b) had granted the states authority over CLEC-ILEC rates. The Interconnection NPRM simply proposes guidelines for interconnection and unbundling which implement Congress' mandate in Section 251. The Commission would not be setting state rates. Instead the Interconnection NPRM simply amplifies Congress' standards in Section 251, which apply with equal rigor to Federal or state ratemaking.

2. The Interconnection NPRM Reflects Appropriate Comity Towards State Pro-Competitive Initiatives.

The Interconnection NPRM adopts exactly the right approach in reconciling state and federal authority and duties under the 1996 Act. The central fact is that neither the states nor the Commission is charged with determining the desirability of local competition. Congress has made that determination, and it cannot be revisited by a state or Federal agency. Furthermore, Congress set out robust and detailed specifications in Sections 251 and 252 (which are further amplified in Section 271) as to how that competition should be implemented. By handing out a such a blueprint for local competition, Congress limited the discretionary decisions to made by its implementors -- whether they be the Commission or the states.

Careful examination of the opposition to the Interconnection NPRM reveals almost no state which feels that any of its specific concerns for local competition are being disregarded or ignored. NARUC's filing is especially instructive. NARUC does not identify a single proposal in the Interconnection NPRM that is inconsistent with Congress's goals in Sections 251 and 252, and is reduced to speculating that: " ... detailed guidelines could well make it more difficult for 'niche' service providers to negotiate the arrangements they need to succeed;" (NARUC Comments at 7).[4] To put it bluntly, the only conflict here is institutional. NARUC has no substantive problem with what the Interconnection NPRM is actually proposing, it just would prefer that state commissions be allowed to implement the provisions themselves.[5]

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[4] See also USTA Comments at 8: "These reservations suggest that any FCC rules must be limited to assure that any pro-competitive State initiative falling fairly within the broad terms of the Statute are allowed to continue."

[5] While US WEST perceives no need for vigorous national guidelines for Section 251, it has no hesitation in asking the Commission to overturn state action of the most traditional sort (US WEST Comments at iv): "Extreme cases are evidenced by state rules and regulations requiring local services (primarily residential service) be priced below the economic costs of providing the service, such as was recently ordered by the WUTC. Such requirements are absolutely inconsistent with competition and the 1996 Act and need to be addressed swiftly [by] the Commission." While issues of subsidized pricing are best addressed first in the current joint board proceeding, the more important fact here is that US WEST perceives no constitutional or Section 2(b) impediment in the Commission taking such action.

B. Congress' Mandate in Section 251 Cannot Be Accomplished Without a Strong National Framework.

Several ILECs contend that a strictly voluntary negotiation process will produce agreements in full compliance with Section 251, and point to progress in their own negotiations and others as evidence.[6] ALTS applauds this progress, but respectfully points out that the proof will be in the pudding. First, no ILEC has yet released its existing interconnection agreements, so there is no way to gauge the provisions of the new agreements against those already in existence. Second, the details of the arrangements involving facilities-based carriers such as MCImetro and MFS have yet to be made public.[7] Regardless of the benefits contained in these agreements for new entrants, these agreements might still fall short of the full requirements of Section 251(c) and Section 271.[8]

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[6] See, e.g., Ameritech Comments at 6: "Ameritech is at various stages in negotiating with twelve telecommunications carriers pursuant to section 251 requests;" SWB Comments at 2: "SWBT became the first ILEC to sign an interconnection agreement under the new Act that will allow an LSP to compete directly with SWBT for local exchange services in Texas;" BellSouth Comments at 6: "To the extent there are local variations [in agreements] that are mutually acceptable to the parties, the Commission should not adopt national standards that preclude such variations." See also recent announcements of understandings between BellSouth and MCImetro (Communications Daily, May 13, 1996, at 4) and between Ameritech and MFS (Ameritech News Release dated May 22, 1996).

[7] See the May 20, 1996, letter of Jonathan B. Sallet, Chief Policy Counsel, MCI, to BellSouth, stating that "we did not reach agreement on the meaning of any substantive obligations created by the Telecommunications Act of 1996."

[8] See Section 252(a)(1)'s reference to agreements that do not comply with either Section 251(b) or 251(c).

Third, even state agency approval of a voluntary agreement under Section 252(e)(2)(A) would not demonstrate the agreement complies with Section 252(c) inasmuch as the state agency can only disapprove voluntary agreements that: "(i) ... discriminate against a telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the pubic interest, convenience and necessity ..." (47 U.S.C. § 252(e)(2).)

Fourth, the fact that a monopolist has decided to sign an agreement to share its markets with a small reseller, or perhaps even one or two larger competitors fails to demonstrate a commitment to full competition. Since most of the ILECs are fighting tooth and nail to prevent agreements from being shared on an unbundled basis, as required by Section 252(i), it is a relatively simple task for ILECs to draft agreements which can only be used by a narrow competitive segment, proclaim their "compliance" with the Act, and then slam the door on everyone else. The signing of an agreement is obviously only a first step in the process of opening the local markets envisioned by Congress. No agreements have been fully implemented.[9]

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[9] BellSouth also attacks the need for national standards on the grounds the Act permits agreements which do not comply with Section 251(b) or 251(c)(BellSouth Comments at 13). But the fact Congress had no desire to discommodate those private parties which need agreements that might not comply with those sections is entirely irrelevant to Congress' clear desire the Commission create rules that fully <u>implement</u> those sections for competitors which <u>do</u> need agreements complying with those sections.

C. The Constitutional Challenges to the Interconnection NPRM Are Without Merit.

US West launches a lengthy attack on the constitutionality of the rules proposed in the Interconnection NPRM by citing familiar axioms requiring that statutes be construed so as to avoid constitutional conflict (Comments at 23-24).[10]

Unfortunately, US WEST refuses to acknowledge that the Commission is acting as the agent of Congress when it implements a new Federal law, and thus -- unlike Article III courts which bear the duty of insuring that Article I bodies comply with the Constitution -- the Commission lacks authority to second-guess Congress' initial determination of constitutionality which is implicit in its passage of a new law.[11] Furthermore, as ALTS shows below, these constitutional challenges are unfounded.

US WEST starts with the assertion that: "The Takings Clause of the Fifth Amendment commands that private property shall not be taken for public use without just compensation" (US WEST Comments at 25). ALTS agrees. But US WEST jumps from this

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[10] US WEST comments at 23-24, citing Public Citizen v. U.S. Dept of Justice, 491 U.S. 440, 466 (1989); Communications Workers of America v. Beck, 487 U.S. 735 (1988); and Murray v. Schooner Charming Betsy, 6 U.S.(2 Cranch) 54, 118 (1804).

[11] See, e.g., Hospital and Service Employees Union, Service Employees Int. Union, AFL-CIO, Local 399 and Delta Air Lines, 263 N.L.R.B. 296, 299 (1982): "We have consistently taken the position that, as an administrative agency created by Congress, we will presume the constitutionality of the Act we are charged with administering, absent binding court decisions to the contrary." The same confusion between Article I and Article III forums also appears in Bell Atlantic's Comments at 42.

unassailable proposition to the claim that use of "cost principles that do not permit a reasonable contribution to the overall operation and investment of the LECs" in pricing interconnection and unbundled elements under Section 251 "would result in a confiscation of the property of incumbent LECs in violation of the Fifth Amendment to the United States Constitution" (id.). US WEST then cites the familiar standard of Federal Power Com'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944), which explains the Fifth Amendment's requirements as they apply to regulatory agencies when setting a rate-of-return for rate base regulated monopolies (id. at 26-27).[12]

It is not clear from US WEST's comments whether it is arguing that: (1) the rates for interconnection and unbundled elements must each meet an independent Fifth Amendment test; or (2) the rates for interconnection and unbundled elements must be set so as to permit US WEST as a whole to earn a return that complies with the Fifth Amendment. In either case, US WEST's contention is clearly wrong.

The Supreme Court in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), explained that a Fifth Amendment analysis of regulatory action cannot be performed on a piecemeal basis: "'Taking' jurisprudence does not divide a single parcel

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[12] See also Bell Atlantic's assertion that: "Setting prices equal to incremental cost also would constitute a Fifth Amendment violation;" (Bell Atlantic Comments at 37-38), and BellSouth's claim that bill-and-keep would violate the Fifth Amendment (BellSouth Comments at 74-75).

into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole ...." Id. at 130 (emphasis added).

If, on the other hand, US WEST is arguing that economic cost standards cannot be applied to interconnection and unbundled elements because this would deny US WEST an overall regulated return consistent with the Fifth Amendment under Hope Natural Gas, US WEST misperceives the legal standard, and also fails to offer the necessary factual predicate.

The Supreme Court demonstrated in Penn Central Transp. Co. v. New York, 438 U.S. 104 (1978), a taking analysis must be scaled to the governmental action under challenge. In the present case, Congress has overturned decades of regulation, and mandated the introduction of local competition, along with increasing the opportunities of many ILECs to provide cable services and long distance services. Any taking challenge would have to reflect the increased opportunities offered to ILECs in the 1996 legislation, and also capture the many other benefits enjoyed by the ILECs under our national system of telecommunications regulation, including highly profitable price cap plans at both the state and Federal level; huge amounts of extremely valuable cellular spectrum that were given to the

ILECs for nothing; and the conclusion by many ILECs, including US WEST, prior to enactment of the 1996 Act that their asset bases were overstated under the conditions that actually existed in their markets, and needed to be written down by substantial amounts.[13]

US WEST also asserts that the collocation requirements of Section 251(c)(6) and the unbundled network elements provisioning of Section 251(c)(3) "involve physical occupations of incumbent LEC property. As such, they amount to per se takings under the Fifth Amendment" (US WEST Comments at 29). US WEST is demonstrably incorrect in each claim.

1. Physical Collocation

ALTS agrees that physical collocation, where an interconnector-competitor's equipment is located in an ILEC's facility, is indeed a per se taking of property which invokes the protection of the Fifth Amendment. Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). But, as US WEST well knows, "The Clause prohibits only uncompensated takings; so long as the Tucker Act provides a subsequent action for redress, generally

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[13] See, e.g., US WEST, 1994 Annual Report "US WEST's decision to discontinue application of SFAS No. 71 was based on the belief that competition, market conditions, and the development of multimedia technology, more tha the prices established by regulators, will determine the future cost recovery by USWC;" (Note 5; emphasis supplied); and Ameritech's 1994 Annual Report: "The company determined that it no longer met the criteria for following [then] FAS 71 due to changes in the manner in which the company is regulated and the heightened competitive environment;" (Note 2 to Ameritech's consolidated financial statements; emphasis supplied).

no constitutional question arises .... " id. at 1445, (emphasis added).[14] A brief discussion of Bell Atlantic will show that nothing prohibits the Commission from ordering any per se taking, provided the taking is authorized by Congress.

The Bell Atlantic court concluded that the Commission lacked authority under the Communications Act of 1934, as it existed prior to the 1996 Act, to order physical collocation because the Commission's action effected a per se taking under the permanent physical occupation rule of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and the court could not find express statutory authority for the Commission's action. The Court therefore relied on a "narrowing construction" of Section 201 and denied the Commission's interpretation of its authority under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), because the Commission's interpretation would have created "'an identifiable class of cases in which application of a statute will necessarily constitute a taking.'" Bell Atlantic, 24 F.3d at 1445.

Of course, the ambiguity that existed in Bell Atlantic is absent here. Congress imposed a clear duty on ILECs to provide collocation, both physical and virtual, and it did so in full knowledge that physical collocation had been deemed a Fifth

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[14] The Court noted that: "The LECs would still have a Tucker Act remedy for any difference between the tariffs set by the Commission and the level of compensation mandated by the Fifth Amendment;" id. at 1445 n.3.

Amendment taking.[15] Congress plainly understood that physical collocation implicates the Fifth Amendment, so its conferral of authority upon the Commission in Section 251(d) to issue regulations implementing the ILECs' duty to provide collocation entirely cures the ambiguity that drove the result in Bell Atlantic.[16]

2. Virtual Collocation

US WEST's claims are equally frivolous as to virtual collocation. The Commission's existing virtual collocation rules, assuming they are readopted under Section 251(c)(6), do not fall within the narrow ambit of Loretto's per se rule. Indeed, US WEST, along with other ILECs, previously distinguished virtual collocation from physical collocation on the explicit basis that virtual collocation did not effect a permanent physical occupation. The Bell Atlantic Court noted that "[p]etitioners challenge[d] the virtual collocation requirement solely on the ground that the Commission's

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[15] The Report to the House Bill specifically stated that a provision requiring physical collocation was "necessary to promote local competition because a recent court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation." Communications Act of 1995, H.R. Rep. No. 204, pt. I, 104th Cong, 1st Sess., at 73 (1994). The proposed Section 242(b)(B) of H.R. 1555 (reprinted in H.R. Rep. No. 204 at 4) required physical and virtual collocation in language nearly identical to that used in Section 251(c)(6) of the 1996 Act.

[16] In light of this clear legislative history, BellSouth's contention that Section 251(dc)(6) does not "grant the Commission the 'statutory authority' that was at issue in Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994)" (BellSouth Comments at 23, n. 55), is unfathomable.

justification for the requirement was inadequate," 24 F.3d at 1447,[17] and the ILECs, including US WEST, explicitly admitted that virtual collocation was not a per se taking.[18]

US WEST and the other ILECs were right then, and are wrong now. Nothing in the Commission's virtual collocation requirements implicates Loretto's per se rule. Virtual collocation does not permit interconnectors a physical occupation of LEC property within the meaning of Loretto, but rather are classic "use" regulations that must be considered under the traditional multifactored takings analysis of Penn Central, if and when such a takings claim is actually brought.

3. Unbundled Network Elements

US WEST contends that "Loop unbundling is, in many senses, even more intrusive than physical collocation (including the

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[17] The Court remanded the virtual collocation rule only because it could not find "that the Commission would have adopted the virtual co-location requirement standing alone." Id.

[18] The ILECs stated:

> "In fact, it is quite clear that the permanent occupation of LEC property is not necessary to establish physical connection. As the FCC conceded earlier in this case, virtual collocation -- a form of interconnection that the Commission recognized was technically and competitively comparable to physical collocation -- 'does not involve physical occupation of the central office' or of other 'LEC property.' . . . Just as the state in Loretto could force the landlord to connect with an electric utility or a cable company without giving either a license to occupy a portion of the building, LECs can be ordered to connect with CAPs without having to relinquish exclusive possession of central office space." Joint Reply Brief for Petitioners, Bell Atlantic Tel. Cos. v. FCC, D.C. Cir. No. 92-1619, pp. 16-17 (Jan. 3, 1994).

virtual variation)" (US WEST Comments at 31). This is a completely topsy-turvy view of Loretto.

Loretto establishes only a "very narrow" rule: the court will find a per se taking only when the government regulation requires the property owner to submit to a permanent physical occupation by a third party. Here, however, it is obvious there will be no occupation at all with unbundled elements, much less a permanent or physical one. Contrary to US WEST's contention that "the occupation of unbundled loops, in the physical sense, may be short in duration and intermittent" (US WEST Comments at 31), ALTS respectfully points out that -- from the viewpoint of "taking" jurisprudence, as opposed to electric engineering -- it is nonexistent. No property of an interconnector is being moved onto ILEC premises, nor are any interconnector personnel being given permanent rights to enter upon ILEC premises, at least at the present time, with respect to unbundled network elements. US WEST's property rights in unbundled network elements are utterly unaffected for the purpose of Loretto's narrow per se rule by the fact that analog voice channel signals (or signaling of whatever kind) come from an competitive carrier's customer rather than US WEST's own customer.

US WEST insists that the "intermittent" use of its unbundled loops amounts to a "permanent right to use the loops," citing to Nollan v. California Coastal Com'n, 483 U.S. 825, 831-32

(1987)(US WEST Comments at 31).[19] But US WEST fails to mention that Nollan involved "a classic right-of-way easement;" id. at 831, n. 1. The electronic signals that traverse an unbundled element may very well be important from an economic perspective -- they may constitute the very rationale for the loop's existence -- but they are entirely distinct from the governmentally mandated "permanent physical occupation" required for application of Loretto.[20] Thus, the requirement to provide unbundled loops is simply not within the scope of Loretto's "very narrow" holding. 458 U.S. at 441.

Loretto acknowledges that government regulation almost always affects some of an owner's property rights (especially the owner's right to "use" property), but its per se rule does not apply to those infringements. In Loretto, the cable

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[19] See also GTE Comments at 65-66.

[20] The Loretto Court's discussion of United States v. Central Eureka Mining Co., 357 U.S. 155 (1958), ably illustrates the point that regulation which solely works an economic taking, no matter how grievous, can only be challenged using the multifaceted factually-oriented test of Penn Central, and cannot qualify as a Loretto taking. Central Eureka Mining was a case in which the government "merely restrict[ed] the use of property" despite its order that the owner of a gold mine "cease operations" and despite "dissenting Justice Harlan's complaint that 'as a practical matter the Order led to consequences no different from those that would have followed the temporary acquisition of physical possession of those mines.'" 458 U.S. at 431 (quoting Central Eureka Mining, 357 U.S. at 181 (Harlan, J., dissenting)). The Court in fact found no taking at all. Because the government did not itself occupy the property, but merely (albeit severely) restricted the owner's use, the Loretto Court found that Central Eureka Mining was not contrary to its rule that a required permanent physical occupation was per se a taking. Id.

company, not the landlord, owned the installation placed upon the building. This, to the Court, was a crucial fact and made the invasion a physical occupation. The Court explicitly distinguished requirements that landlords install certain types of property which the landlords presumably still would own: "[O]ur holding in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like . . . ." 458 U.S. at 440. "[T]hese regulations" do not constitute per se takings because they "do not require the landlord to suffer the physical occupation of a portion of his building by a third party." Id.

4. Construction of Facilities

US WEST proclaims a previously-unrecognized constitutional principle when it states: " ... the Commission cannot coerce an incumbent LEC to construct facilities without ensuring that the cost of such involuntary construction is fully recovered" (US WEST Comments at 33; emphasis in original). This is startling in light of the economic history of America's regulated industries. While the estate of the Penn Central was eventually compensated for the public seizure and conversion of its bankrupt assets into Conrail, no railroad has ever succeeded in arguing that a general obligation to interconnect with competitors without compensation somehow obligated the ICC to

"ensure" those costs were recovered.[21]

US WEST insists that

> "Certainly, if the Supreme Court held that a taking occurred when New York required Ms. Loretto to suffer a cable installation on her apartment building, it would hold that an even greater infringement of her property right occurred if she was also required to pay for the installation of the facilities herself" (US WEST Comments at 34).

But US WEST need not speculate about what the Supreme Court might say under such facts, since the Court actually addresses this very situation in Loretto, and arrives at a very different conclusion than US WEST. In response to criticism from the dissent that the per se rule articulated in the majority opinion might eventually consume existing "regulatory takings" analysis under the Fifth Amendment, the Court noted that a regulation that required the landlord to provide facilities to enable a tenant to receive cable television [which is US WEST's hypothetical above] "might present a different question" because the landlord would own the facilities. "The fact of ownership is . . . not simply incidental." Id. at 440 n.19.

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[21] The railroad cases cited by US WEST involved situations where the agency acted outside such a power. In Washington ex rel. Oregon and N. Co. v. Fairchild, the Court states: " ... there can be no doubt of the power of a state, acting through an administrative body, to require railroad companies to make track connections." The Court then explained that: "But manifestly that does not mean that a commission may compel them to build branch lines, so as to connect roads lying at a distance from each other." 32 S. Ct. at 540. And in ICC v. Oregon-Washington R. & Nav. Co., 53 S.Ct. 266 (1993), the Court overturned an ICC order requiring a carrier to construct a new line 185 miles long.

US West's discussion of property as a "'bundle' of rights with many 'strands'" (US WEST Comments at 30) therefore misses the point of Loretto Loretto created a category of per se takings only where the government cuts one particular strand (albeit a crucial strand) -- the right of physical occupation. Government regulations that merely affect a property owner's rights "to use and control," "to exclude others," and "to dispose" of property -- and even those regulations that completely "take" certain property rights, such as in Andrus -- may be takings under Penn Central, but they are not subject to any per se rule because they do not implicate the owner's right of physical occupation.[22]

II. THE SUBSTANTIVE ASPECTS OF THE INTERCONNECTION NPRM ARE FULLY SUPPORTED.

A. Costing and Pricing Standards Need to Reflect "Economic Costs" to Achieve the Competitive Environment Mandated by Congress.

Perhaps the most important remaining task for the

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[22] US WEST's assertion that the regulations under consideration in the Interconnection NPRM violate the equal protections of laws guaranteed by the Fourteenth Amendment needs little reply. US WEST claims that: "The fact that legislation is intended to further the cause of competition in a particular industry does not insulate it from challenge under the Equal Protection Clause'" (US WEST Comments at 36, citing Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985). But the Court in Ward never states that competition as a general proposition is not insulated from attack under the Fourteenth Amendment, but rather speaks to the protection of intrastate commerce at the expense of interstate commerce. 470 U.S. at 877. Similarly, Dolan v. City of Tigard, 114 S.Ct. 2309 (1994) involved a situation where the Court upheld a city's requirement that a portion of a floodplain not be built upon, and overturned only the portion of the city's action that failed to explain why the associated greenway needed to be public rather than private. 114 S.Ct. at 2320.